

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GORDON D. IVERSON,

Plaintiff,

v.

LINDA McMAHON,
Acting Commissioner of Social Security,

Defendant.

ORDER

06-C-0339-C

United States Magistrate Judge Stephen L. Crocker filed a report and recommendation in this case on January 29, 2007, in which he recommended affirmance of the defendant Commissioner's decision to deny plaintiff Gordon D. Iverson's application for disability insurance benefits and supplemental social security income. Plaintiff has filed objections to the recommendation, contending that the magistrate judge erred in three ways: (1) upholding the administrative law judge's credibility determination; (2) censuring plaintiff's attorney for misstatements of fact; and (3) approving the administrative law judge's step five determination that plaintiff would be able to perform certain jobs in the national economy identified by the vocational expert.

The magistrate judge explained in detail why he found the administrative law judge's decision well-reasoned and supported by the record. I agree with his determination. Nothing in plaintiff's brief in support of his objections persuades me that the magistrate judge erred in reaching the decision he did or that he failed to consider any relevant evidence. It is unnecessary to add to the magistrate judge's thorough and convincing explanation for his recommendation that defendant's decision should be upheld.

However, I will comment on plaintiff's counsel's objection to the magistrate judge's censure of counsel's arguments. One of plaintiff's arguments for remand was his allegation that the administrative law judge did not cite the specific listing she was considering when she found that plaintiff's impairments did not meet or medically equal a listed impairment and that she conducted only a perfunctory analysis of this issue. As the magistrate judge explained and as the administrative law judge's written decision shows, this allegation is incorrect.

Plaintiff also alleged that the administrative law judge failed to ask the medical expert, Andrew Steiner, M.D., whether plaintiff's impairments equaled a listed one. This, too, was incorrect. The transcript of plaintiff's hearing reads as follows:

Q Doctor, could you provide me with your opinion as to whether the Claimant is subject to any impairment or combination of impairments which would either meet or medically equal any of the listings?

A Well, because of the absence of any associated radicular neurological loss with

the back condition, I don't think that this — these things would reach a listings level of documentation. I — with that I am addressing not the psychiatric disorders, just the physical disorders.

AR 461.

Plaintiff's counsel acknowledges "confusion in stating that the ALJ did not ask ME Steiner whether a listing was equaled." Plt.'s Obj., dkt #12, at 6. He says now that the deficiency he should have pointed out was not that the administrative law judge did not ask Dr. Steiner about the severity of plaintiff's impairment but that Steiner never answered the question. Counsel concedes that he asserted in "the argument itself" [by which he means his initial brief in support of the motion for summary judgment], Plt.'s Mem., dkt. #8, at 18, that the administrative law judge erred in failing to consider whether plaintiff's condition equaled a listing, not that the administrative law judge failed to inquire whether the condition equaled a listing. Plt.'s Obj, dkt. #12, at 6. He asserts that in the reply brief, dkt. #12 at 2-4 [it appears that he meant to cite p. 1 of the reply brief], he stated that the administrative law judge asked the medical expert whether plaintiff met or equaled a listing and he argues that "the context of the briefs shows that [the] arguments were made in good faith and not intended to cause confusion." Id.

Whether plaintiff's counsel intended to cause confusion or whether he caused it out of sheer negligence, the fact is that in both the initial brief and the reply, plaintiff focused on the administrative law judge's alleged failure to consider whether plaintiff's impairments

met or equaled a listed impairment and her alleged failure to ask the proper question of the medical expert. Plaintiff's counsel's efforts to show that he did not misrepresent the situation are riddled with more errors and misrepresentation. He says that the context of the briefs shows that his arguments were made in good faith, but the pages of his briefs that he cites in support of his claim focus on the administrative law judge's alleged failure to ask about the listings. A close reading discloses one reference in the first four pages of the reply brief acknowledging, in the passive voice, that the medical expert was asked whether plaintiff's impairments met a listing. This one statement stands in contrast to four statements in the same four pages to the effect that the administrative law judge failed to consider whether plaintiff's impairments met a listing and that she failed to ask this question of the medical expert. "Confusion" of this kind make the court's work more difficult. Not only do the misrepresentations waste the court's time, but they shed doubt on the accuracy of the party's other assertions and citations. Under the circumstances, it was not inappropriate for the magistrate judge to reprimand plaintiff's counsel for his inaccurate work.

Plaintiff's counsel has been chastised in the past for late filings; his timely filings in this case are appreciated. His challenge now is to exercise greater care in his review of the record and the assertions he makes. He owes no less to his clients and to the court.

ORDER

IT IS ORDERED that the report and recommendation entered by the United States Magistrate Judge is ADOPTED as the court's own. FURTHER, IT IS ORDERED that the motion of plaintiff Gordon D. Iverson for summary judgment is DENIED and the decision of defendant Linda McMahon, Acting Commissioner of Social Security, denying plaintiff's application for disability insurance benefits and supplemental security income is AFFIRMED.

Entered this 22d day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge